

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY LEONARD FOSIE,

Appellant.

No. 32913-1-II

UNPUBLISHED OPINION

HOUGHTON, J. -- Jeffrey Leonard Fosite appeals his conviction of marijuana possession with intent to manufacture or deliver, arguing that the trial court erred in denying his motion to suppress because the affidavit supporting the search warrant does not establish the informant's veracity. He further argues that the State improperly relied on high power consumption evidence obtained in violation of his state constitutional right to privacy in order to obtain the search warrant. Because the affidavit was deficient, even including the evidence of high power consumption, we reverse and remand.

FACTS

On September 30, 2003, the Washington State Patrol received a call on its marijuana grow hotline, reporting an indoor marijuana grow operation at 70 Burns Road in Port Hadlock. The caller reported seeing three rooms full of marijuana plants three weeks earlier.

Detective John Halsted interviewed the caller, described in the affidavit in support of a search warrant as a “concerned citizen” who is “known to him.” Clerk’s Papers (CP) at 29. But the caller wished to remain anonymous for fear of retaliation. Police investigation revealed that the caller had a “limited criminal history,” which included, at least, a felony conviction of marijuana possession and marijuana distribution. CP at 29.

In addition to familiarity with marijuana through personal use, the caller learned about indoor marijuana grow operations from documentaries and television shows. Also, the caller admitted that he¹ currently used marijuana; however, the caller did not have any pending criminal matters for which he sought assistance in exchange for the information provided.²

The caller reported observing about 100 marijuana plants in each of two rooms, numerous grow lights hanging from the ceiling, polyvinylchloride piping (PVC) plumbing, the strong odor of marijuana throughout the house, and a silver handgun at the residence.

The caller said that he had visited the house within the previous month and met with Kenyon Kovash there. The caller described Kovash and the car he drove, stating that Kovash originally came from Vancouver but that he had been living at the house for about six months. According to the caller, Kovash remarked to him that the grow lights caused high power bills.

The police verified the caller’s description of Kovash, his car, and the residence. The police also issued an “administrative subpoena” to Puget Sound Energy, a private utility, and

¹ The affidavit referred to the reporting party as “he or she.” We use “he” for clarity.

² At argument, both Fosite and the State incorrectly stated that the informant had an outstanding driving under the influence warrant. The record shows that Kenyon Kovash, who lived at 70 Burns Road, and not the informant, had an outstanding warrant.

obtained the residence power consumption records. CP at 27. Those records identified Fose as the utility subscriber for the preceding six months and showed a dramatic increase in power usage over the prior year. The power consumption also exceeded by five times the average usage for a single family Washington residence. The increased power consumption at the residence was consistent with a marijuana grow operation.

The police filed a complaint for a search warrant. In addition to the information above, the complaint stated that Fose's criminal history included a prior arrest for felony possession of marijuana. A judge issued the search warrant.

Based on evidence obtained during execution of the search warrant, the State charged Fose with marijuana possession with intent to manufacture or deliver. The trial court denied Fose's motion to suppress. The trial court also denied Fose's motion for reconsideration of the ruling.

At trial, Halsted testified that when he executed the search warrant, he found marijuana plants, high intensity grow lights, hoses, scales, and drug paraphernalia.

The jury found Fose guilty as charged and he appeals.

ANALYSIS

Reliability of Confidential Informant

Fose contends that the trial court erred in denying his motion to suppress. He does not dispute the informant's basis of knowledge necessary under the *Aguilar-Spinelli*³ test. Rather, he

³ This two-prong (informant's basis of knowledge and reliability) test derives from two United States Supreme Court cases: *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). Washington continues to apply this test, although the United States Supreme Court does not. See *State v. Jackson*, 102 Wn.2d 432, 443, 688 P.2d 136 (1984).

asserts that the affidavit in support of the search warrant does not establish the informant's reliability. He argues that the police only corroborated innocuous facts, including increased power consumption, rather than any information pointing to criminal activity. We agree.

Standard of Review

When reviewing the denial of a motion to suppress, we determine whether substantial evidence supports the trial court's findings and, in turn, whether those findings support the conclusions of law. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016 (2002). We treat unchallenged findings as verities on appeal. *Ross*, 106 Wn. App. at 880.

A search warrant must be based on probable cause. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists when sufficient facts and circumstances enable a reasonable person to conclude that either criminal activity is occurring or that contraband is present at a certain location. *Cole*, 128 Wn.2d at 286. Reviewing for an abuse of discretion, we generally give great deference to an issuing judge's determination of probable cause. *Cole*, 128 Wn.2d at 286. We resolve any doubts as to the existence of probable cause in favor of the warrant. *Cole*, 128 Wn.2d at 286.

Probable cause for a search warrant may be based on information from an informant. *State v. Gaddy*, 152 Wn.2d 64, 71, 93 P.3d 872 (2004). Under the *Aguilar-Spinelli* test, an informant's tip may establish probable cause if the affidavit sufficiently demonstrates the informant's basis of knowledge and reliability. *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723

(1964); *Gaddy*, 152 Wn.2d at 71. Independent police investigation corroborating the informant's tip sufficiently cures a deficiency in either or both prongs. *Cole*, 128 Wn.2d at 287. But the police must corroborate more than public or innocuous facts. *Cole*, 128 Wn.2d at 287. Rather, corroborating evidence must point to criminal activity along the lines suggested by the informant. *State v. Jackson*, 102 Wn.2d 432, 438, 688 P.2d 136 (1984) (quoting *United States v. Canieso*, 470 F.2d 1224, 1231 (2nd Cir. 1972)).

Status of Informant

The extent of corroboration needed to establish an informant's veracity depends, in part, on the informant's status. *See State v. Northness*, 20 Wn. App. 551, 556-57, 582 P.2d 546 (1978). Where a citizen informant comes forward and reveals his identity to the issuing judge, the informant's veracity may be established by the internal consistency and detailed nature of the information provided. *Northness*, 20 Wn. App. at 557. Greater corroboration is required of a confidential informant in order to guard against the possibility of an "anonymous troublemaker" who is unaccountable for false accusations or who may be involved in the criminal activity or motivated by self-interest. *State v. Ibarra*, 61 Wn. App. 695, 700, 812 P.2d 114 (1991).

The specter of an anonymous troublemaker persists in instances where the informant is known to the police but not to the judge. But the specter may be dispelled by sufficient facts establishing that the informant truly is a disinterested citizen and not a criminal or professional informant. *Ibarra*, 61 Wn. App. at 700; *see also State v. Payne*, 54 Wn. App. 240, 244, 773 P.2d 122 ("determination of credibility depends to some extent on whether the informant is truly a citizen informant, *i.e.*, an innocent victim or an uninvolved witness to criminal activity"), *review denied*, 113 Wn.2d 1019 (1989). Such facts may include a description of the informant, an

explanation for his presence at the scene, and the informant's reason for wanting to remain anonymous. *Ibarra*, 61 Wn. App. at 700.

Here, the police, but not the issuing judge, knew the informant's identity. Although the affidavit describes the informant as a "concerned citizen," it does not provide sufficient facts to support an inference that the informant truly is a disinterested citizen rather than a criminal informant who may be involved in the criminal activity or motivated by self-interest. CP at 29.

Relying on *State v. Bauer*, 98 Wn. App. 870, 991 P.2d 668, *review denied*, 140 Wn.2d 1025 (2000), and *State v. Berlin*, 46 Wn. App. 587, 731 P.2d 548 (1987), the State argues to the contrary. Both cases are distinguishable.

In *Berlin*, three different confidential informants reported seeing marijuana plants in a shed next to the defendant's residence. 46 Wn. App. at 588. The affidavit in support of the search warrant stated that the informants had no criminal background, came forward voluntarily, provided their names and contact information, and wanted to remain anonymous for fear of retaliation. *Berlin*, 46 Wn. App. at 589. Division One held that "[t]hough reasonable minds could differ as to the reliability of the citizens here, there is enough information from which the magistrate could find sufficient indicia of reliability." *Berlin*, 46 Wn. App. at 591-92.

In *Bauer*, a confidential informant reported a marijuana grow operation at the defendant's residence. 98 Wn. App. at 872-73. The affidavit in support of the search warrant stated that the informant had no criminal record, had been a Washington resident for more than nine years, came forward voluntarily, provided his name, was motivated by concern about unlawful drugs as well as a desire for a reward from the hotline, and wanted to remain anonymous for fear of retaliation. *Bauer*, 98 Wn. App. at 877. In addition, the detective verified various background facts provided

by the informant, including a description of the suspect's residence and vehicles. In a two-to-one decision, we held that the affidavit satisfied the reliability prong of the *Aguilar-Spinelli* test. *Bauer*, 98 Wn. App. at 877.

Bauer and *Berlin* are distinguishable from the facts presented here because the affidavits included sufficient facts to establish that the informants were truly disinterested citizens rather than criminal informants. In each case, the police verified that the informants had no criminal records. *Bauer*, 98 Wn. App. at 873; *Berlin*, 46 Wn. App. at 589. Further, in *Berlin*, the statements of three distinct individuals corroborated one another. *See Payne*, 54 Wn. App. at 246 (prior tip may corroborate a later one even though neither tip, alone, establishes probable cause). Here, the facts are insufficient to infer that the informant is a truly disinterested citizen rather than a criminal informant or to otherwise dispel suspicions about the informant's involvement or motivation.

The State argues that the informant's willingness to identify himself to police and to provide contact information supports an inference of reliability. An informant's willingness to identify himself to police is only one factor to be considered in determining whether the informant is entitled to a presumption of reliability as a citizen informant. *State v. Rodriguez*, 53 Wn. App. 571, 576, 769 P.2d 309 (1989). In *Bauer* and *Berlin*, background checks revealed that the informants had no criminal history, supporting an inference that they were truly disinterested citizens without motive to fabricate or falsify. Here, police investigation revealed that the informant had at least two marijuana-related convictions.⁴ The informant's willingness to identify

⁴ The affidavit states: "The concerned citizen has a limited criminal history with one felony conviction for possession of marijuana. He or she admits to being a marijuana user. The caller was once involved in the distribution of marijuana before being arrested and convicted for that

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himself led to information that actually raises rather than allays suspicions about his possible motivation or involvement.

The State argues that the informant's marijuana-related convictions and admission of marijuana use support an inference of reliability by establishing the informant's familiarity with

offense in 1998." CP at 29. It is unclear whether the "limited criminal history" includes any additional offenses than the two marijuana-related offenses described.

marijuana. These facts support a finding that the informant had an adequate personal basis for the information provided, but they do not support a finding of veracity. On the contrary, the informant's criminal history weighs against a finding of reliability. *See Bauer*, 98 Wn. App. at 881 (Armstrong, J., dissenting) (informant's marijuana use and unexplained presence at crime scene suspicious factors).

The State also argues that the informant's admission of current marijuana use is a statement against penal interest that supports an inference of reliability. An informant's statement against penal interest may be intrinsically reliable because a person generally would have no motive to falsify such information. *See State v. Lair*, 95 Wn.2d 706, 711, 630 P.2d 427 (1981) (informant's admission that he sold drugs to the suspect intrinsically reliable). Here, the informant's admission of marijuana use may be intrinsically reliable, but that fact is not relevant to whether the *defendant* was operating a marijuana grow operation. Thus, the admission is not the kind of statement against penal interest that would support an inference that the informant was telling the truth about the alleged criminal activity.

Further, the affidavit does not state the informant's purpose for visiting the residence. Although an informant's failure to explain his presence at the scene is not fatal to a finding of reliability, it undercuts an inference that the informant is a true citizen informant. *See Payne*, 54 Wn. App. at 245-46 (informant's unexplained presence as a houseguest at the site of a marijuana grow undercut an inference that he was a true citizen informant, but the informant's lack of criminal history dispelled suspicion); *compare with Rodriguez*, 53 Wn. App. at 574, 577 (automotive service technician who discovered drugs in the suspect's car while servicing the vehicle was clearly a citizen informant who "obtained his information in entirely unsuspecting

circumstances”). The State asserts that the informant was obviously Kovash’s “house guest” but, even if true, that fact does not dispel suspicions about the informant’s involvement and motivation, particularly given that the informant had prior marijuana-related convictions and admitted to currently using marijuana.

The informant stated that he wished to remain anonymous for fear of retaliation from Kovash or his associates. The informant’s observation of a large silver handgun at the grow operation lends credence to that fear. *See Payne*, 54 Wn. App. at 245 (crediting informant’s fear of retaliation based on seeing the defendant in possession of a firearm). The informant’s fear of retaliation supplies one apparent valid reason for his desire to remain anonymous. But it does not overcome suspicions raised by his drug-related criminal history, unexplained presence at the scene, and admission of current marijuana use.

In sum, insufficient facts demonstrate that the informant is a true citizen informant rather than a criminal informant, who may be involved in the criminal activity or motivated by self-interest. Thus, the State is not entitled to a presumption of reliability but must establish the informant’s veracity through corroboration.

Corroboration

Fosie argues that the evidence of increased power usage is an innocuous fact that does not establish the informant’s veracity. Again, we agree.

High power consumption alone is an innocuous fact that does not corroborate an informant’s veracity. *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986). “[T]here are too many plausible reasons for increased electrical use to allow a search warrant to be issued based on increased consumption.” *Huft*, 106 Wn.2d at 211 (citing *State v. McPherson*, 40 Wn. App. 298,

698 P.2d 563 (1985)). High power usage is an appropriate factor to consider in combination with other suspicious facts when determining whether probable cause exists. *Cole*, 128 Wn.2d at 291.

But the additional facts must point to suspicious or criminal activity. *See Cole*, 128 Wn.2d at 291 (high power usage plus marijuana odor, use of fictitious name and social security number, and prior narcotics convictions); *State v. Murray*, 110 Wn.2d 706, 712, 757 P.2d 487 (1988) (high power consumption, together with other suspicious facts and verification of innocuous facts, sufficiently corroborates anonymous tip based on personal knowledge); *State v. Johnson*, 79 Wn. App. 776, 782, 904 P.2d 1188 (1995) (high power usage plus marijuana odor), *review denied*, 128 Wn.2d 1023 (1996); *State v. Solberg*, 66 Wn. App. 66, 79, 831 P.2d 754 (1992) (high power usage plus marijuana odor, blacked out windows, and mildew accumulation on walls), *reversed on other grounds*, 122 Wn.2d 688, 861 P.2d 460 (1993); *State v. Sterling*, 43 Wn. App. 846, 851-52, 719 P.2d 1357 (high power usage plus prior narcotics convictions and numerous other suspicious facts), *review denied*, 106 Wn.2d 1017 (1986).

High power consumption combined with the verification of only innocuous facts does not sufficiently corroborate an informant's tip. *See State v. Young*, 123 Wn.2d 173, 196, 867 P.2d 593 (1994) (high power consumption plus corroboration of suspect's phone number and address insufficient to establish probable cause); *Huft*, 106 Wn.2d at 211 (high power consumption and bright light emitting from the basement window insufficient to establish probable cause); *State v. Rakosky*, 79 Wn. App. 229, 239-40, 901 P.2d 364 (1995) (high power consumption plus use of an alias and prior marijuana-related criminal charges insufficient to establish probable cause); *State v. Mickle*, 53 Wn. App. 39, 44, 765 P.2d 331 (1988) (high power consumption plus unsubstantiated allegation of suspect's prior criminal activity insufficient to establish probable

cause); *State v. White*, 44 Wn. App. 215, 218-19, 720 P.2d 873 (1986) (high power usage plus bright lights, noisy fan, and heavy foot traffic insufficient to establish probable cause), *review denied*, 107 Wn.2d 1020 (1987); *McPherson*, 40 Wn. App. at 301 (high power consumption, condensation on windows, potting soil outside, and black plastic on windows insufficient to establish probable cause).

The State argues that the evidence of high power consumption tips the scale in favor of finding veracity when viewed together with the verification of other information the confidential informant provided and the tip's detail.⁵ But the verification of the informant's description of Kovash and of the residence merely supports an inference that the informant personally knew Kovash, not that he was involved in criminal activity. *See Young*, 123 Wn.2d at 196 (abnormally high power consumption, together with corroboration of suspect's phone number and address are "innocuous facts that do not necessarily indicate criminal activity") (citing *Huft*, 106 Wn.2d at 211). The detailed nature of the tip establishes only the informant's basis of knowledge, not his reliability. *See Jackson*, 102 Wn.2d at 441 ("A liar could allege firsthand knowledge in great detail as easily as could a truthful speaker."). Our Supreme Court has rejected the proposition that an exceptionally strong showing on one prong can make up for a deficiency on the other. *See*

⁵ The affidavit also states that Fosite had a criminal history of arrest for felony possession of marijuana. A suspect's criminal history is a factor that may be considered in determining whether probable cause exists. *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006 (prior conviction for unlawful imprisonment with sexual motivation supported probable cause determination for kidnap, rape, and murder charges), *cert. denied*, 534 U.S. 1000 (2001); *Sterling*, 43 Wn. App. at 851 (prior narcotics conviction supported probable cause to believe defendant had a marijuana grow operation). But there is no indication when the arrest occurred, whether Fosite was charged or convicted, or even that probable cause supported the arrest. Thus, Fosite's criminal history does not support the probable cause determination.

Jackson, 102 Wn.2d at 441 (rejecting the “totality of the circumstances” test of *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), in favor of the *Aguilar-Spinelli* test).

Thus, the detailed nature of the informant’s tip, while adding weight to the basis of personal knowledge prong of the *Aguilar-Spinelli* test, does not provide additional support of the informant’s reliability.

The State also argues that the evidence of high power consumption corroborates the informant’s statement that Kovash said the power bills were high because of the grow lights. The trial court agreed, stating “[h]ow could the caller possibly know that the power bill for 70 Burns Road would be unusually high unless Mr. Kovash mentioned that fact?” CP at 46. But the affidavit supplies an obvious answer to that question: the informant had personal knowledge of marijuana grow operations and thus likely knew they require high electrical consumption.

““Merely verifying “innocuous details,” commonly known facts or easily predictable events should not suffice to remedy a deficiency in either the basis of knowledge or veracity prong.””

McPherson, 40 Wn. App. at 301 (quoting *Jackson*, 102 Wn.2d at 438). Just as the informant could have fabricated a detailed description of the marijuana plants, grow lights and PVC piping, he could have fabricated Kovash’s incriminating statement about high power bills. The high power usage is not made more suspicious by the informant’s saying that Kovash complained about the grow lights causing high power bills. The power records confirm only that power usage was high, not that Kovash made the incriminating admission.

There are too many plausible explanations for the increased power usage other than the one the informant supplied for the power consumption evidence to establish the informant’s reliability. *See Rakosky*, 79 Wn. App. at 240 (noting that a building’s high power usage is not

suspicious “even if neighbors and police cannot tell whether it contains a hot tub, tomatoes, orchids, marijuana, exotic animals or nothing at all”), and *State v. Kelley*, 52 Wn. App. 581, 588, 762 P.2d 20 (1988) (Reed, C.J., dissenting) (“The defendant could just as well have been growing orchids.”); *compare with Murray*, 110 Wn.2d at 710 (police observations confirmed that abnormally high power usage in basement was inconsistent with common household uses).

The independent police investigation did not produce suspicious or incriminating facts pointing to criminal activity. In the absence of such facts, the evidence of increased power usage does not sufficiently corroborate the informant’s tip. Thus, the trial court erred in denying Fosite’s suppression motion.

Privacy Interest in Private Utility Records

Fosite also contends that he has a constitutionally protected privacy interest in his power consumption records and that the police unlawfully intruded into that interest by obtaining his records via an “administrative subpoena.” Appellant’s Br. at 46. He urges us to adopt the plurality’s reasoning in *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997), which recognized a constitutional privacy interest in public utility power records, and apply it here to *private* utility power records. He also urges us to broaden the privacy interest in power records even further by holding that only a search warrant would provide sufficient “authority of law” to justify state intrusion on that interest. Appellant’s Br. at 42. Because we hold that the affidavit in support of the search warrant is deficient even with the evidence of Fosite’s high power consumption, we decline to decide whether the use of an administrative subpoena to obtain the power records was a violation of his state constitutional right to privacy.

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Reversed and remanded for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, J.

I concur:

Armstrong, J.

QUINN-BRINTNALL, C.J. (dissenting) — Under our state and federal constitutions, a magistrate may only issue a search warrant following a determination of probable cause. Probable cause must be based upon “facts and circumstances sufficient to establish a reasonable inference” that criminal activity is occurring or that contraband exists at a certain location. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980)). If a court finds that probable cause for the issuance of a warrant exists, it *shall* issue a warrant. CrR 2.3(c).

In Washington, to establish probable cause for issuance of a search warrant based upon an informant’s tip detailed in an affidavit, the affidavit must satisfy the two-prong *Aguilar-Spinelli*⁶ test. *State v. Jackson*, 102 Wn.2d 432, 440, 688 P.2d 136 (1984). Specifically, the affidavit must demonstrate the informant’s (1) basis of knowledge and (2) veracity. *Jackson*, 102 Wn.2d at 440. To satisfy both prongs of the *Aguilar-Spinelli* test, the affidavit must (1) show that the informant has personal knowledge, and (2) establish the credibility of the informant through past history or demonstrate facts and circumstances that support an inference that the informant was truthful. *State v. Lair*, 95 Wn.2d 706, 710, 630 P.2d 427 (1981).

In challenging the validity of the search warrant, Jeffrey Leonard Fosie does not dispute the informant’s basis of knowledge. Nor could he dispute the informant’s basis of knowledge because the affidavit shows that the known but unnamed concerned citizen informant had personal knowledge of the reported information. When an informant supplies information based on his personal knowledge, the first prong of the *Aguilar-Spinelli* test is satisfied. *State v. Wolken*, 103

⁶ *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

Wn.2d 823, 827, 700 P.2d 319 (1985). Thus, the first *Aguilar-Spinelli* prong is satisfied.

But Fosite does contend that the affidavit in support of the search warrant does not establish the informant's reliability, the second *Aguilar-Spinelli* prong. The affidavit does not attest that the informant has provided credible information in the past. Rather, it contains a recitation of the facts and circumstances that support an inference that the informant's information is reliable.

I believe the concerned citizen who reported this marijuana grow for a number of reasons. I have been able to corroborate aspects of the caller's story through independent sources such as police records, power records, and other databases. The caller's description of the residence at 70 Burns Road matches a photograph of the house I obtained from the Jefferson County Assessors Office. I found through an administrative subpoena that the power usage for the residence is very high, as the caller reported. The description of [Kenyon] Kovash and his vehicle matches what the caller told Detective Halsted. The caller has a basis of knowledge about the drug trade, specifically marijuana. The caller admits to being a marijuana user and has a previous arrest for possessing marijuana. The caller has no pending criminal matters which he or she is seeking assistance with.

Clerk's Papers at 10.

In addition, though the officer did not disclose the caller's identity to the magistrate, the officer did know who he was. Thus, his admission that he used marijuana is an admission against interest.⁷ Moreover, because making a false report could result in criminal prosecution,⁸ the statement is arguably a statement made against his penal interests and provides some indicia of reliability. *Lair*, 95 Wn.2d at 711.

⁷ In assessing whether an informant's statements were against his penal interest, the reliability inquiry is whether a reasonable person in the declarant's position would have made such disclosures without believing they were true. ER 804(b)(3); *State v. Parris*, 98 Wn.2d 140, 147-48, 654 P.2d 77 (1982) (stating that under ER 804(b)(3) an informant's statement against his penal interest is not excluded by the hearsay rule when the informant is unavailable as a witness).

⁸ A person can be convicted for giving false information to a law enforcement officer under either RCW 9A.76.020 or .175. See 13A Seth A. Fine & Douglas J. Ende, *Washington Practice: Criminal Law*, § 1803, at 367-68 n.1 and n.3 (2d ed. 1998).

We judge an application for a search warrant in the light of common sense, resolving doubts in favor of the warrant. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). Generally, we defer to the probable cause determination of the issuing judge. *Young*, 123 Wn.2d at 195. In my opinion, under the deferential standard of review applicable to the affidavit in this case, there is probable cause for any reasonable magistrate to believe there was a marijuana grow operation located at 70 Burns Road. Thus, I respectfully dissent.

QUINN-BRINTNALL, C.J.